

§ 137.302

(3) Add additional program and/or project funding, including seeking supplemental appropriations.

§ 137.302 Are Federal funds available to cover start-up costs associated with initial Tribal assumption of environmental responsibilities?

(a) Yes, start-up costs are available as provided in section 508(c) of the Act [25 U.S.C. 458aaa-7(c)]. During the initial year that these responsibilities are assumed, the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j-1(a)(2)] must include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the agreement necessary:

(1) To plan, prepare for, and assume operation of the environmental responsibilities; and

(2) To ensure compliance with the terms of the agreement and prudent management.

(b) Costs incurred before the initial year that the agreement is in effect may not be included in the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j-1(a)(2)] if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

§ 137.303 Are Federal or other funds available for training associated with Tribal assumption of environmental responsibilities?

Yes, Self-Governance Tribes may use construction program and project funds for training and program development. Training and program development funds may also be available from other Federal agencies, such as the Environmental Protection Agency and the National Park Service, state and local governments, and private organizations.

§ 137.304 May Self-Governance Tribes buy back environmental services from the IHS?

Yes, Self-Governance Tribes may “buy back” project related services in their construction project agreement, including design and construction engineering, and environmental compliance services from the IHS in accordance with Section 508(f) of the Act [25 U.S.C.

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458aaa-7(f)] and §137.95, subject to the availability of the IHS’s capacity to conduct the work.

§ 137.305 May Self-Governance Tribes act as lead, cooperating, or joint lead agencies for environmental review purposes?

Yes, Self-Governance Tribes assuming Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa-8] are entitled to receive equal consideration, on the same basis as any Federal agency, for lead, cooperating, and joint lead agency status. For informational purposes, the terms “lead,” “cooperating,” and “joint lead agency” are defined in the CEQ regulations at 40 CFR 1508.16, 1508.5, and 1501.5 respectively.

§ 137.306 How are Self-Governance Tribes recognized as having lead, cooperating, or joint lead agency status?

Self-Governance Tribes may be recognized as having lead, cooperating, or joint lead agency status through funding or other agreements with other agencies. To the extent that resources are available, the Secretary will encourage and facilitate Federal, state, and local agencies to enter into agreements designating Tribes as lead, cooperating, or joint lead agencies for environmental review purposes.

§ 137.307 What Federal environmental responsibilities remain with the Secretary when a Self-Governance Tribe assumes Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa-8]?

(a) All environmental responsibilities for Federal actions not directly related to construction projects assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa-8] remain with the Secretary. Federal agencies, including the IHS, retain responsibility for ensuring their environmental review procedures meet the requirements of NEPA, NHPA and related provisions of law, as called for in §137.297.

(b) The Secretary will provide information updating and changing IHS agency environmental review policy and procedures to all Self-Governance

Tribes implementing a construction project agreement, and to other Indian Tribes upon request. If a Self-Governance Tribe participating under section 509 of the Act [25 U.S.C. 458aaa-8] does not wish to receive this information, it must notify the Secretary in writing. As resources permit, at the request of the Self-Governance Tribe, the Secretary will provide technical assistance to the Self-governance tribe to assist the Self-governance Tribe in carrying out Federal environmental responsibilities.

§ 137.308 Does the Secretary have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa-8]?

No, the Secretary does not have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa-8].

§ 137.309 How are NEPA and NHPA obligations typically enforced?

NEPA and NHPA obligations are typically enforced by interested parties who may file lawsuits against Federal agencies alleging that the agencies have not complied with their legal obligations under NEPA and NHPA. These lawsuits may only be filed in Federal court under the provisions of the APA, 5 U.S.C. 701-706. Under the APA, a Federal judge reviews the Federal agency's actions based upon an administrative record prepared by the Federal agency. The judge gives appropriate deference to the agency's decisions and does not substitute the court's views for those of the agency. Jury trials and civil discovery are not permitted in APA proceedings. If a Federal agency has failed to comply with NEPA or NHPA, the judge may grant declaratory or injunctive relief to the interested party. No money damages or fines are permitted in APA proceedings.

§ 137.310 Are Self-Governance Tribes required to grant a limited waiver of their sovereign immunity to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa-8]?

Yes, but only as provided in this section. Unless Self-Governance Tribes consent to the jurisdiction of a court, Self-Governance Tribes are immune from civil lawsuits. Self-Governance Tribes electing to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa-8] must provide a limited waiver of sovereign immunity solely for the purpose of enforcing a Tribal certifying officer's environmental responsibilities, as set forth in this subpart. Self-Governance Tribes are not required to waive any other immunity.

§ 137.311 Are Self-Governance Tribes entitled to determine the nature and scope of the limited immunity waiver required under section 509(a)(2) of the Act [25 U.S.C. 458aaa-8(a)(2)]?

(a) Yes, Section 509(a)(2) of the Act [25 U.S.C. 458aaa-8(a)(2)] only requires that the waiver permit a civil enforcement action to be brought against the Tribal certifying officer in his or her official capacity in Federal district court for declaratory and injunctive relief in a procedure that is substantially equivalent to an APA enforcement action against a Federal agency. Self-Governance Tribes are not required to subject themselves to suit in their own name, to submit to trial by jury or civil discovery, or to waive immunity for money damages, attorneys fees, or fines.

(b) Self-Governance Tribes may base the grant of a limited waiver under this subpart on the understanding that:

(1) Judicial review of the Tribal certifying official's actions are based upon the administrative record prepared by the Tribal official in the course of performing the Federal environmental responsibilities; and

(2) Actions and decisions of the Tribal certifying officer will be granted deference on a similar basis as Federal officials performing similar functions.